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**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

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COURT OF CRIMINAL APPEALS
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MARC WAKEFIELD DUNHAM

VS.

THE STATE OF TEXAS

**ON DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS FOR THE
FOURTEENTH JUDICIAL DISTRICT OF TEXAS
AT HOUSTON
CAUSE NO. 14-17-00098-CR**

**Appealed from the County Criminal Court at Law Number 6
of Harris County, Texas
Cause No. 2109329**

APPELLANT'S REPLY BRIEF ON DISCRETIONARY REVIEW

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ORAL ARGUMENT NOT GRANTED

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REPLY TO STATE'S RESPONSE TO FIRST ISSUE

THE EVIDENCE OF DECEPTIVE BUSINESS PRACTICES IS LEGALLY INSUFFICIENT, ESPECIALLY WHERE THE COMPLAINANT UNDERSTOOD AND SIGNED A SALES CONTRACT THAT UNAMBIGUOUSLY STATED THE NATURE OF THE BUSINESS TRANSACTION.

The State contends that the "statute and the charging instrument in this case addressed practices in the 'course of business,' not merely at the moment a card is swiped or pen is put to paper." See State's Brief at 13. This position embraces the court of appeals's conclusion that "[t]he relevant inquiry does not focus on what the complainant knew at the time she signed the contract; instead, it focuses on what appellant did—what he represented—during the course of business." Dunham v. State, 554 S.W.3d 222, 229 (Tex. App.—Houston [14th Dist.] 2018, pet. granted) (citing Penal Code § 32.42).

The court of appeals's interpretation of § 32.42 creates a dangerous and "sweeping dragnet"[1] for people who advertise or sell products in Texas. Negotiations between a buyer and seller often result in different understandings of the terms of a proposed bargain. For that reason, a written contract clearly sets forth the terms of the transaction. For a contract to be valid, there must be "a meeting of the minds." See, e.g., Wells v. Hoisager, 553 S.W.3d 515, 522 (Tex. App.—El Paso 2018, no pet.). Critically, the court of appeals and the State ignored

[1] Gregory v. City of Chicago, 394 U.S. 111, 117 (1969) (Black, J., concurring).

that the complainant and appellant had a clear meeting of the minds *before she signed the contract*. Appellant clarified any possible confusion that resulted from his initial omission—his failure to state affirmatively that he worked for a different alarm company before entering her home. When he "presented the papers" to her, which she signed, she already understood that she was entering into a service contract with a different alarm company and would pay a higher monthly fee for additional services (3 R.R. 36, 38-39). She signed and understood the contract and accompanying written documents, which unambiguously stated that the agreement was for a different alarm system serviced by a different company (3 R.R. 38-41, 45; SX 1-2, 5; DX 5). No evidence demonstrates that appellant fraudulently induced her to sign the contract. He simply did not commit a crime.

It would be illogical, anomalous, and unjust for this Court to interpret § 32.42 to impose criminal liability under these circumstances when, under well-established Texas tort law, appellant would not be liable civilly for fraudulent inducement of a contract. See, e.g., DRC Parts & Accessories, LLC, v. VW Motori, 112 S.W.3d 854, 858 (Tex. App.—Houston [14th Dist.] 2003, pet. den'd) (en banc) ("One of the elements of a fraud claim is that the plaintiff actually and justifiably relied on the misrepresentation to suffer injury. . . . [R]eliance upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law.");

Gulf, C. & S.F. Ry. Co. v. Fenn, 76 S.W. 597, 599 (Tex. Civ. App. 1903) ("The contract is plain and unambiguous in its terms . . . . There is neither allegation nor proof that appellee J.R. Fenn was not given an opportunity to read the contract, or that he was lacking in capacity to fully understand its terms and effect, nor is it even alleged that he failed to read it. On the contrary, the undisputed evidence shows that it was read by him. Under pleadings and proof of this character, it will not be seriously contended that appellees should be permitted by parol evidence of what their understanding of the contract was to add to and change in its most essential part a solemn, written instrument executed by them. Conceding that the agent of appellant did, as alleged, falsely represent to appellees that the contract was limited to 15 years, such false representation would not entitle the appellees to have the contract canceled, because the representation was concerning a fact equally within the knowledge, or means of knowledge, of both parties.").

This Court should hold that, for a defendant to be liable criminally under § 32.42 when a complainant understood and signed a contract that clarified any potential prior misunderstanding, a defendant must have fraudulently induced the complainant into signing the contract by one of more of the deceptive practices set forth in the statute. That simply did not occur here.

This Court should conclude that the evidence is legally insufficient to sustain the conviction and issue an appellate acquittal. Otherwise, no salesperson in Texas

is safe from prosecution under § 32.42. Under the State's and the court of appeals's expansive interpretation of the statute, a salesperson commits a crime if, from the beginning of an encounter with a potential customer, he fails to articulate every conceivable, material term of sale or fact that could contribute to the customer's decision whether to accept the bargain, and the customer misunderstands a term of sale or fact as a result of the salesperson's omission, and even if the customer walks away from the sale without agreeing to the terms. That cannot and should not be the law.

REPLY TO STATE'S RESPONSE TO SECOND ISSUE

THE 12 SUBSECTIONS OF 32.42(b) CONTAIN SEPARATE OFFENSES THAT REQUIRE JURY UNANIMITY AND ARE NOT SIMPLY ALTERNATIVE "MANNER AND MEANS" OF COMMITTING THE SINGLE OFFENSE OF DECEPTIVE BUSINESS PRACTICE.

The State contends that § 32.42(b) creates "a single criminal act—committing deceptive business practices"—and the "enumerated acts" in the statute describe different "manner and means" rather than distinct offenses. See State's Brief at 21-23. The State errs in characterizing all of the acts enumerated in the statute as "manner and means" of a single offense.

If the State were correct, then § 32.42(b) contains *at least 56* different "manners and means." The State theoretically could allege each manner and means in a single count of a single charging instrument. And a trial court

theoretically could set forth each manner and means disjunctively in a single application paragraph of the jury charge. The Legislature presumably did not intend such an "absurd result."[2]

Appellant derives 56 different ways of committing the offense through a *conservative* methodology that considers two aspects of the statute: the four different mental states set forth in the first sentence of § 32.42(b) multiplied by the 14 different criminal acts set forth in §§ 32.42(b)(1)-(12).[3] Unquestionably, the four mental states are alternative "manner and means." Cf. Mathis v. United States, ___ U.S. ___, 136 S.Ct. 2243, 2253 n.3 (2016) (describing "intentionally, knowingly, and recklessly" in § 22.01(a)(1) of Texas Penal Code as "interchangeable means of satisfying a single *mens rea* element"). However, a plausible but more aggressive interpretation of the statutory scheme reflects that the Legislature created *hundreds* of different ways to commit deceptive business practice. Consider all of the disjunctive definitions set forth in § 32.42(a)—*e.g.*, the three different types of "deceptive sales contests" in § 32.42(a)(5), or the seven different types of "sales" in § 32.42(a)(9)—combined with the many different ways a person can violate each subsection of § 32.42(b).

[2] Courts must interpret statutes to avoid "absurd results." See, e.g., Sims v. State, 569 S.W.3d 634, 640 (Tex. Crim. App. 2019).

[3] Subsection 32.42(b)(8) includes two discrete acts that violate that subsection, as does § 32.42(b)(12). Therefore, there are at least 14 different acts set forth in the 12 subsections.

For example, a person can violate § 32.42(b)(3) at least four different ways, *without* regard to the four different culpable mental states, depending on whether the person represented a property or a service and furnished a weight or a measure:

(1) taking more than the represented quantity of **property** when as a buyer the actor furnishes the **weight**;

(2) taking more than the represented quantity of **property** when as a buyer the actor furnishes the **measure**;

(3) taking more than the represented quantity of **service** when as a buyer the actor furnishes the **weight**; or

(4) taking more than the represented quantity of **service** when as a buyer the actor furnishes the **measure**.

Although § 32.42(b)(3) contains these four different "manner and means" (times four different culpable mental states), they collectively constitute a single offense of deceptive business practice in violation of subsection (b)(3). Jurors need not be unanimous as to whether the actor represented a property or a service, nor do they need to be unanimous as to whether he furnished a weight or a measure. But they need to agree unanimously that he committed one or more of the four alternative manner and means with a culpable mental state. This same methodology of calculating the number of different ways to commit deceptive business practice applies to each subsection of § 32.42(b), resulting in a total number that perhaps

only a Ph.D. in mathematics could calculate—or at least someone who retained more arithmetic knowledge than appellant's counsel—but certainly totals in the hundreds.

The Legislature structured § 32.42(b) so the culpable mental states modify the *actus reus* element of "deceptive business practice," not the element of being "in the course of business." The remainder of § 32.42(b)—all 12 subsections—is devoted to the different acts that constitute "deceptive business practice." The only plain interpretation of the statute is that the gravamen of the offense is the deceptive business practice element—the nature of the conduct—not the circumstance of being in the course of business. The 14 different acts contained in the 12 subsections, which define the *actus reus* element of deceptive business practice, are separate offenses, not alternative manner and means of a single offense of deceptive business practice. However, within each of the 14 different acts contained in the 12 subsections, there are hundreds of alternative manner and means of committing deceptive business practice when considering the four culpable mental states, all the disjunctive definitions in § 32.42(a), and the different permutations littered throughout § 32.42(b).

All of the subsections under § 32.42(b) are devoted to the element of what constitutes a "deceptive business practice." None of them has anything to do with what constitutes being "in the course of business." But if the State and the court of

appeals are correct, the gravamen of the offense is the single mention of "in the course of business" in § 32.42(b) instead of the remaining 100 percent of the statute in subsections (1)-(12) that is devoted to what constitutes an act of deceptive business practice. The text of the statute simply does not support the interpretation adopted by the State and the court of appeals.

Moreover, the different, core deceptive acts enumerated in §§ 32.42(b)(1)-(12) span a wide variety of conduct: using, selling and offering to sell, possessing, taking, passing off, representing, advertising, making a statement, and conducting a contest. The focus of the proscribed conduct ranges from selling less or taking more than what is promised, to altering or mislabeling a commodity; from lying about who made a product or who performed a service, to lying that something old is new; from lying about what a product or service really is, to lying about the price of something; and finally to lying about the terms of a sales contest or the chance of winning it. These many different acts are not "morally and conceptually equivalent." Jefferson v. State, 189 S.W.3d 305, 313 (Tex. Crim. App. 2006). That the Legislature assigned different degrees of punishment for some of the acts—some are Class A misdemeanors, and others are Class C misdemeanors—demonstrates that the 14 different acts contained in the 12 subsections are not simply alternative "means." See Richardson v. United States, 526 U.S. 813, 836-37 (1999) ("The alternative means of fulfilling an element must reasonably reflect

notions of equivalent blameworthiness or culpability, whereas a difference in their perceived degrees of culpability would be a reason to conclude that they identified different offenses altogether.") (citation and internal quotation marks omitted).

The trial court's charge was erroneous because it did not require jurors to agree unanimously on which alleged deceptive act appellant committed. Because the instruction harmed appellant for the reasons identified in his opening brief, this Court should reverse his conviction and remand for a new trial.

CONCLUSION

The Court should reverse the court of appeals's decision and issue an appellate acquittal or, alternatively, set aside the judgment of conviction and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I served a copy of this document on Cory Stott, assistant district attorney for Harris County, and on Stacey M. Soule, State Prosecuting Attorney, by electronic service on May 17, 2019.

/S/ Josh Schaffer
Josh Schaffer

CERTIFICATE OF COMPLIANCE

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/S/ Josh Schaffer
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